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31 May 2006
EXPRESS SERVICE



Hon. Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings

JUN 1 2006

Re: City of Jersey City, et al. --
Petition for a Declaratory Order, *Part of*
F.D. 34818 *Public Record*

Opposition to 212 Marin Blvd LLC Motion for
Leave to File Reply and Opposition to 26 May
and 30 May Motions to Strike


Dear Mr. Williams:

Enclosed for filing please find the original and ten (10) copies of an Opposition to the Motion for Leave to File a Reply which intervenors 212 Marin, et al., served on May 23, combined with an Opposition to the motions to strike embedded in the May 26 and May 30 Replies filed by 212 Marin, et al., and Conrail respectively in the above proceeding. The Opposition is on behalf of petitioners City of Jersey City, Rails to Trails Conservancy, the PRR Harsimus Stem Embankment Preservation Coalition, and New Jersey State Assemblyman Manzo.

I hereby certify service by express (next business day) delivery upon Robert Jenkins III, Mayer, Brown, Rowe & Maw, 1909 K Street, N.W., WDC 20006 (Conrail), Carmine Alampi, 1 University Plaza (Ste. 404), Hackensack, NJ 07601, and Fritz R. Kahn, 1920 N Street, N.W. (8th Fl), WDC 20036-1601, on the date above.

Thank you for your assistance in this filing.

Very truly,



Charles H. Montange
for petitioners

City of Jersey City,
Rails to Trails Conservancy,
Embankment Preservation Coalition,
and NJ State Assemblyman Manzo

Encls. (10 plus original by express)

cc. Robert Jenkins, Esq. for Conrail
Carmine Alampi, Esq. for SLH Properties
Fritz Kahn, Esq. for SLH Properties
City of Jersey City (Mr. Curley, Ms. Monahan)
Rails to Trails Conservancy (Ms. Ferster)
Preservation Coalition (Ms. Crowley)
Assemblyman Manzo
(all w/encls.)

BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 34818

City of Jersey City,
Rails to Trails Conservancy,
Pennsylvania Railroad Harsimus Stem
Embankment Preservation Coalition,
and New Jersey State Assemblyman Louis M. Manzo --
Petition for a Declaratory Order

OPPOSITION
TO INTERVENOR 212 MARIN BOULEVARD, LLC'S
"PETITION FOR LEAVE TO REPLY"
and

OPPOSITION TO
May 26/May 30 MOTIONS TO STRIKE

on behalf of
PETITIONERS CITY OF JERSEY CITY,
RAILS TO TRAILS CONSERVANCY,
PENNSYLVANIA RAILROAD HARSIMUS STEM
EMBANKMENT PRESERVATION COALITION, and
NEW JERSEY STATE ASSEMBLYMAN LOUIS M. MANZO

As set forth below, Petitioners City of Jersey City, et al., oppose the "petition for leave to file a reply" tendered by interveners 212 Marin Boulevard, LLC, et al. (hereinafter referred to as "SLH Properties") on or about May 23, 2006, in this proceeding.

This memorandum also serves as our opposition to the SLH Properties and Consolidated Rail Corporation ("Conrail") motions to strike the "relevancy" portion of our May 23, Motion for Leave to File Penn Central Track Chart. These motions to Strike were embodied in the SLH and Conrail "Replies" filed on May 26 and May 30 respectively.

Background

In this Board's scheduling order for this proceeding filed

February 8, 2006, this Board adopted a procedural schedule for this proceeding proposed by respondent Consolidated Rail Corporation ("Conrail") and interveners 212 Marin Boulevard, LLC, et al. (hereinafter "SLH Properties"). That schedule provided 30 days (until March 10) for petitioners City, et al. to file an opening statement. It provided six weeks (until April 24) for Conrail and SLH Properties to file their Reply, and it provided two weeks (until May 9) for City, et al. to rebut.¹ Conrail and SLH Properties did not request any right to file a surrebuttal, nor did this Board so provide.

The parties adhered to the above schedule. Petitioners City of Jersey City, et al., duly filed their Rebuttal on May 9.

Summary

On May 23, intervenor SLH Properties filed a motion for leave to file a reply. Under 49 C.F.R. § 1104.13(c), replies to replies, exactly like the one filed by SLH Properties, are not permitted. Here, SLH Properties violates not only § 1104.13(c) but also the very procedural schedule that it (and Conrail) advocated that this Board adopt. Such conduct should not be allowed.

The sole grounds offered in interveners' motion for allowing interveners to breach the rule and the procedures which

¹ The procedural schedule basically gave Conrail and SLH Properties ten weeks to prepare their case, beyond the six weeks they already had to develop a position between the filing of City of Jersey City's et al.'s petition and the Board's decision. Petitioners City, et al. basically had only fifteen days to make a response to whatever Conrail and SLH Properties contrived.

they advocated is the statement that "Jersey City ... flagrantly has misrepresented the facts of record and inexplicably has disregarded the Board's precedents." SLH motion at p. 1. Based on this bombast, and nothing more, SLH invites the entry of its unlawful reply into the record to "correct Jersey City's distortions and omissions." SLH motion at p. 2. Save for one arguable exception, SLH fails to identify any distortion or omission by petitioners' City, et al. But as discussed below, the one arguable omission which SLH does highlight in SLH's proposed May 23 "Reply" has now been cured without objection by either Conrail or SLH. That being the case, the substantive ground that SLH offers for its Reply is totally moot, and the Motion for Leave must be denied as purely repetitive and redundant as well.

Argument

In order to get to SLH's one arguable point, which is now moot, it is first necessary to offer a bit of explanation. We can begin by indicating, point blank, that SLH offers no new evidence, no new precedent, no new anything in its proposed Reply.² The gravamen of SLH's argument in its Reply seems to be

² SLH attaches two exhibits to its proposed Reply served May 23: SLH Exhibit 1 is page 241 of the USRA Final System Plan. But petitioners City of Jersey City, et al., presented that as part of their Opening Statement in Appendix VIII, filed 10 March 2006. It supports City's argument. It is not new evidence.

SLH Exhibit 2 is supposedly page 12 of USRA's Official Errata Supplement, dated December 1, 1975. This document is "new," but it is merely a revision of p. 262 of the USRA Final System Plan. Insofar as it relates to the Harsimus Cove Yard, it reads identically to the original p. 262 of the USRA Final

that City ignored the various old valuation maps/reports (val maps) or maps apparently derived from same upon which SLH relies, and some ICC/STB cases that SLH cited.

City did not ignore the maps cited by SLH; City accurately dismissed them as irrelevant.³ None of them correspond to Line Code 1420, Jersey City to Harrison, MP 1.0 to 7.0, Harsimus Branch, conveyed to Conrail as a "line of railroad" at page 272 of the United States Railroad Administration's Final System Plan. The only maps and charts that correspond to what USRA described at p. 272 are the track charts presented by City, et al., and the ultimate deed. USRA itself discounted the val maps as a source for the purposes relevant here, as we noted in our Op. Statement at p.20.

Similarly, the gravamen of SLH's "legal" argument is that City ignored some cases SLH cited dealing with the regulatory status of railroad property that USRA had not designated as lines of railroad to Conrail.⁴ These cases are totally

System Plan. City of Jersey City, et al., included that page in our Appendix VIII, filed 10 March 2006. It supports City's argument. Although the document is "new," it could have been presented before, and in any event as germane here is repetitive of evidence already in the proceeding.

SLH's two exhibits accordingly must be stricken as late-filed and totally redundant.

³ See, e.g., Petitioners' Rebuttal at pp. 15-17.

⁴ SLH at p. 8 of its "Reply" tendered May 23 refers to East Penn Railway, Inc. -- Modified Rail Certificate, STB F.D. 34628, served Dec. 21, 2004, and several other cases. We have looked at these cases and we have looked at them again. They were irrelevant the first time, and they are still irrelevant. They did not involve rail property designated to Conrail as

irrelevant here. USRA at p. 272 of the Final System Plan designated the Harsimus Branch as a line of railroad. SLH's strident claim in its proposed May 23 Reply that City is somehow ignoring cases or evidence to the contrary amounts to a "when did you stop beating your wife" kind of insinuation. The basic assumption behind the question is totally erroneous, and the answer thus is "we never beat our wife." As applied here, SLH's entire argument is based on an erroneous assumption that the Harsimus Branch was not designated under the Final System Plan for Conrail operation. Once the assumption is recognized as erroneous, then all SLH's arguments and cases are irrelevant no matter how stridently and repeatedly SLH presents them.

This leads us to the one arguable "omission" which SLH in its May 23 proposed Reply does note: SLH states at p. 4 of its proposed Reply that petitioners' argument is "preposterous" because petitioners did not present a Penn Central track chart.

SLH (and Conrail) could have, but did not, raise this argument before. We believed SLH and Conrail were originally silent because, as a logical matter, the point seems irrelevant. The only "maps" showing exactly the body of property with the same nomenclature and numerology used by USRA for the Harsimus

lines of railroad. SLH proves nothing by citing irrelevant cases and then complaining when petitioners treat them as such. Congress did not grant Conrail authority unilaterally to reclassify or to abandon rail property which was designated to Conrail as a "line of railroad." Conrail must obtain abandonment authority for such property, either under ordinary procedures or under NERSA. Rebuttal pp. 10-13. There are no cases to the contrary of this proposition.

Branch at Final System Plan p. 272 are the 1976, 1977, and 1980 Conrail track chart excerpts filed by City of Jersey City, et al. as Appendix IX of Petitioners' Opening Statement filed on March 10, 2006 in this proceeding. The milepost designations in those track charts correspond to a similar 1965 Pennsylvania Railroad track chart (also contained in Appendix IX). The charts all show the relevant portion of the Harsimus Branch at issue here (former Henderson Street to Waldo) as lying between approximately MP 1.3 and MP 2.54 with the bank of the Hudson river at MP 1.0. The chief difference between the referenced Conrail charts and the older 1965 Pennsylvania Railroad chart is the latter did not refer to a "line code" number because those were developed by the Penn Central Engineering Department after the formation of Penn Central. The property in all the referenced track charts -- from 1965 to 1980 -- corresponded to the property conveyed in the relevant deed. See Appendix XV and XVI of the Opening Statement.

This leads us to the "omission" alleged by SLH Properties. At p. 4 (first full paragraph) of its proposed Reply tendered May 23, SLH alleges that City failed to produce a Penn Central track chart for the Harsimus Branch contemporaneous with the USRA Final System Plan. SLH says it is "preposterous" for City to suggest that USRA in 1975 relied on Conrail's subsequent track charts.

City did not regard this alleged "omission" as material, because the 1965 Pennsylvania Railroad track chart (which SLH

and Conrail totally ignore), and the 1976, 1977 and 1980 Conrail track charts all show the Harsimus Branch to be what the City says it is. By inference there was no change between 1965 and 1980, and the line code must necessarily have remained the same pre-1976. In any event, in their Replies on April 24, neither Conrail nor SLH raised an objection that City failed to produce a Penn Central track chart. Moreover, the inference is also supported by the fact that although SLH and Conrail tried to conjure up confusion about milepost designations for the portion of the Harsimus containing the Embankment by trying to extrapolate milepost numbers from old valuation maps, neither SLH nor Conrail has presented to this agency any map (including any valuation map) or chart (including any track chart) that shows anything resembling the body of property described at p. 272 of the Final System Plan for "line code 1420" with designations of mileposts corresponding to MP 1.0 (Jersey City) to MP 7.0 (Harrison). Although Conrail and SLH wave old val maps for a part of the Harsimus Branch around, USRA at p. 241 of its Final System Plan discounts the val maps as a source for what USRA was designating to Conrail:

"valuation maps generally reflect historical designations which were made when the lines were built. Through the years, portions of lines have been relocated, and mileposts on some lines have been renumbered. Milepost designations contained in the track charts do not always correlate with the valuation

maps...."

USRA essentially warned the world that the val maps do not correlate to the track charts on which it placed primary reliance.

Since Conrail and SLH had an opportunity to raise the issue of Penn Central track charts in their April 24 replies, but did not do so, petitioners City, et al. can readily object that raising the issue now is not only too late, but also highly prejudicial,⁵ for it is obviously contrived to prevent petitioners from having the opportunity to reply to what SLH is presenting as a dispositive argument, and since under the procedural schedule, petitioners were to have the final right of reply.

But the niceties of this point need not be debated or determined, because SLH's point is now totally moot. Petitioners City of Jersey City, et al., on May 23 served the Penn Central Railroad track chart for "line code 1420", dated January 1, 1975. This chart is contemporaneous with the USRA Final System Plan. Insofar as relevant here, it is identical to the Conrail charts (on which SLH opined we placed "preposterous" reliance), and it very clearly uses the same numerology and designation terms as were employed by USRA in its Final System

⁵ After all, under the procedures proposed by Conrail and SLH, and adopted by this Board, petitioners are to have an opportunity to rebut any arguments raised by Conrail or SLH in reply.

Plan.⁶ Now one can with total confidence say the only "maps" showing exactly that body of property with the proper nomenclature and milepost calls are the 1965 Pennsylvania Railroad, the 1975 Penn Central track charts, and the 1976, 1977, and 1980 Conrail track chart excerpts filed by City of Jersey City, et al. MP 1.0 is at the Hudson River. Former Henderson Street is at approximately MP 1.3. MP 2.54 is Waldo. This is so consistently from 1965 through 1980, and that is the relevant period.⁷

This whole episode underscores the basic problem for Conrail and SLH in this proceeding. Neither Conrail nor SLH had any germane Penn Central material dealing with the Harsimus Branch. Thus, when in discovery petitioners sought track charts from Conrail (and SLH), Conrail stated it had none from prior railroads (and SLH of course had nothing at all). This means that Conrail (and SLH) acted in ignorance of the basic documents which USRA's Final System Plan indicated were the primary means USRA employed to determine its line designations

⁶ The Penn Central chart shows Waldo at MP 2.54. It shows the Hudson River at MP 1.0. Former Henderson Street does not have an express MP designation but appears to be approximately MP 1.3. Because the milepost designation is approximate, we have used a geographic specification (street name) in our petition to eliminate confusion, as is customary in abandonment proceedings.

⁷ Conrail in its May 30 Reply (motion to strike) claims that Ryan V.S. shows the val maps conform to the mileposts on the track charts but this is hocus pocus. The relevant track charts put MP 1.0 at the Hudson River waterfront, show Waldo at MP 2.54, and show (former) Henderson at approximately MP 1.3.

to Conrail.⁸ As a result, all the arguments of Conrail and SLH are nothing more than post hoc rationalizations for what was and remains an obviously and inherently unlawful attempted unilateral abandonment of a line of railroad by internal reclassification by the Conrail Law Department on 4/14/94. See Op. Statement, Appendix I, first page. That unlawful unilateral reclassification was evidently undertaken by the Conrail in ignorance of basic documents germane to the regulatory status of the property at issue in this proceeding.

Once petitioners City, et al., established through discovery that Conrail and SLH had no relevant documents and were merely engaged in highly suspect post hoc rationalizations, petitioners in anticipation of the argument SLH now tries to make immediately put notices at appropriate railfan sites on the internet for the relevant Penn Central track charts for all of New Jersey. A former Penn Central/Conrail employee eventually contacted petitioners with a complete set. On May 23 -- the same day that SLH Properties served its Motion for Leave to File a Reply -- petitioners City of Jersey City served a motion for leave to file the Penn Central track charts for New Jersey as

⁸ Since Conrail claims to have no Penn Central track charts, its actions in connection with the Harsimus Branch are inherently suspect, for it obviously is acting partially blind in making unilateral decisions on what was conveyed to it as a line of railroad. Without the Penn Central track charts, Conrail simply was never in a position to make a statement as to what USRA's Final System Plan p. 272 designation of the Harsimus Branch conveyed. Thus, the Conrail law department in unilaterally reclassifying the portion of the Branch at issue here as a spur acted in a state of ignorance. Ignorance does not excuse Conrail from complying with the law.

relevant here. Our motion for leave to file the Penn Central track chart crossed SLH's "petition" for leave to file a reply in the service process.

To their credit, both Conrail and SLH have now indicated that they do not oppose the filing of the Penn Central track chart.⁹ Since no party objects to the filing, City legitimately assumes that it must now be treated as part of the record. This being the case, the only possible "omission" which SLH identifies in connection with its "Petition for Leave to File a Reply" is now moot. Indeed, the alleged "omission" became moot on the day SLH tendered its "Petition."

Ironically, although Conrail and SLH did not object to the filing of the track chart, both filed objections to statements in City, et al.'s motion for leave to file the track chart in which we explained why the track chart was relevant. The gravamen of SLH's objection to our explanation of relevance was that our explanation was redundant of our argument. The gravamen of Conrail's objection is less clear; Conrail apparently decided to use the track chart filing as an opportunity to make some surrebuttal arguments along the lines of SLH's May 23 filing.

But if SLH at page 4 of its proposed Reply of May 23 contends, as it does, that omission of the Penn Central track chart is fatal to petitioners City, et al., then it certainly is

⁹ SLH Reply filed May 26, 2006; Conrail Reply filed May 30, 2006.

legitimate for petitioners to observe that it is relevant that there is no omission. SLH and Conrail cannot have it both ways. They cannot maintain that SLH may legitimately point out a purported fatal hole in our case by reason of lack of a document, and then a couple days later complain that we can not show the relevance of the fact that the very hole that SLH finds fatal to us is not a hole at all. SLH has sought leave to file a Reply talking about the relevancy of an omission; surely SLH cannot begrudge us the opportunity to point out that the sharp sword which SLH perceives is aimed against them, not us.

As noted, Conrail uses its May 30 Reply to add some surrebuttal arguments of its own along the lines of SLH's May 23 Reply. Conrail's arguments are repetitive or flawed, just as are those in SLH's of May 23. Conrail claims that if the track charts control, then all of the Harsimus Yard would have needed abandonment authority. Conrail May 30 filing at 3. Conrail's argument in extremis is fundamentally wrong. CSX Transportation -- Abandonment Exemption -- in Midland County, MI, AB 55 (sub-no. 573X), served August 25, 1999 (cited in our Op. Statement at p. 36, n.24) is directly on point: the case involved an abandonment of 1.85 miles of line, running through a yard and terminating at the end of the yard, a situation essentially identical to that posed here. CSX (which is one of Conrail's owners) obtained an abandonment authorization so it could reclassify the entire property as yard track. That is all Conrail needed to do and should have done, at least before it

abandoned its last track, here. In short, this is not a case where someone is claiming that Conrail needs abandonment authority solely for all sidings and spurs. It is a case where Conrail mistakenly or in ignorance of the facts did nothing at all to obtain the required authority to abandon a long-established through line. As to the Ryan Verified Statement, that statement is based on valuation maps on which USRA did not rely in the Final System Plan or in the deed. All the relevant track charts all show what the City says they show: the Hudson River at MP 1.0. It follows that Ryan and Conrail are in the realm of post hoc rationalization due to their mistakes flowing from failure to look at the relevant documents in the first instance.

The bottom line from all this is that what is redundant is SLH's entire "Reply" served May 23, coupled with the SLH and Conrail Replies of May 26 and May 30 respectively insofar as they embed motions to strike our showing of the relevancy of the Penn Central track chart. If anything merits exclusion, the SLH Reply does. The motions to strike merit denial.

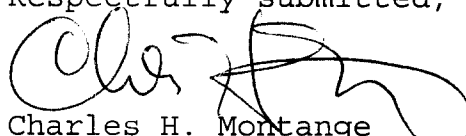
Conclusion

The "petition" for leave to file a reply to our Rebuttal tendered by SLH Properties must be denied as contrary to 49 C.F.R. § 1114.13(c), as inconsistent with the procedural schedule that both SLH and Conrail advocated and this Board adopted, as totally superfluous and redundant, as out of time, and as moot. The Conrail and SLH motions to strike must be

denied.

Should this Board nonetheless allow SLH's Petition, petitioners furnish herewith a brief "errata" pointing out the numerous errors, omissions, redundancies and irrelevancies in SLH's Reply. Under the procedural schedule, petitioners City of Jersey City, et al., are entitled to a fair opportunity to reply to arguments raised by SLH and Conrail. If SLH (or Conrail) thinks it has something non-redundant to say, then certainly City has a right to reply. But we believe the better course under the procedural schedule adopted by this Board would be for this Board simply to disallow SLH's motion for leave to file SLH's proposed May 23 Reply, in its redundant, moot, misleading and inaccurate entirety.

Respectfully submitted,



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SLH ERRATA

Definitions: "SLH p." refers to the page number in intervenor SLH's Reply for which it sought leave to file on or about May 23, 2006.

"Petitioners" refers to City of Jersey City, et al. SLH wants to make this case a dispute with Jersey City alone, and thus refers to its adversary as "Jersey City." However, there are four petitioners: the City, Rails to Trails Conservancy, the Embankment Preservation Coalition, and Assemblyman Manzo.

"Pet. Op." and "Rebuttal" shall refer to petitioners' opening statement filed March 10 and Petitioners' Rebuttal filed May 9 in this proceeding respectively.

General statement. Virtually every argument which SLH raises could have been raised in response to our original Petition or our Opening Statement. In some other cases, SLH claims that petitioners did not respond to some SLH claim in our Rebuttal, but the answer in most cases is, among other things, that SLH ignored what we said in our Opening Statement. In all events, almost everything that SLH now raises is repetitive, redundant, and otherwise unavailing, misleading or inaccurate. This errata is tendered only in the event that the Board elects to open the record for extra replies. We will focus on problems other than repetitiveness and redundancy in the errata below.

1. SLH p. 2. SLH says that Jersey City contends that USRA relied on the track charts for "inventorying" the bankrupt

railroads' properties. This is not our contention and "inventorying" is neither an issue in the case at bar nor relevant in any way. Inventorying to us means determining the assets belonging to the bankrupt estate, including track, tie, structures, equipment and land. I was personally involved in the inventorying process with these bankrupt roads in my first job as a Washington, D.C., attorney long ago, and have some personal knowledge as to what went on in that regard. Of course USRA (and everyone else truly involved) looked at more than simply track charts for that purpose. However, when USRA designated lines of railroad to Conrail for continued operations, it relied primarily on track charts. The Penn Central Engineering Department had done a very logical and comprehensive organization of the Penn Central system into track charts with line codes for each line of railroad in the system. It is hardly surprising that USRA looked to the track charts to determine what in the Final System Plan would be transferred to Conrail for operation.

More importantly, what is at issue in this case is what USRA meant by its designation of line code 1420, Harsimus Branch, as a line of railroad to Conrail, at USRA, Final System Plan p. 272. USRA said it relied primarily on the Penn Central track charts for purposes of identifying lines of railroad to be conveyed to Conrail at p. 241 of the Final System Plan. The relevant track charts before, during and after the designation process all now are before the agency and show exactly what

petitioners say they show, and what USRA said it was doing.

2. SLH pp. 2-3. SLH says Jersey City ignored material "available" to USRA, like certain "valuation maps" ("val maps"). We did not ignore val maps. The chief function of a genuine val maps at USRA (and elsewhere) is to give a preliminary indication of the width of a right of way and the nature of the railroad's original title in the property. The val maps were prepared for a massive valuation proceeding conducted by ICC around the time of World War I. They do not necessarily correspond to subsequent track charts prepared for different purposes. In our Op. Statement at p. 20 we noted that USRA indicated that the val maps "reflect historic designations which were made when lines were built," were not necessarily reliable due to changes, and "do not always correlate" with track charts. Final System Plan at p. 241. USRA clearly made those statements to explain why it relied primarily on the track charts for its designations of lines to Conrail.

Moreover, there are no valuation maps that use any milepost numbers corresponding to line code 1420. What corresponds to line code 1420 are all the track charts that so far exist on the Planet Earth from 1965 to 1980, and those are all before this Board as uncontested evidence at this point in time. In the circumstances, USRA obviously did not use the val maps for the purpose SLH seeks to use them (namely, milepost designations or determinations of what was included in a "line of railroad"), and they are simply irrelevant to the points at

issue in this proceeding. USRA relied on the line codes and track charts: it said so at p. 241 of the Final System Plan and certainly what it did at p. 272 corresponds to the Penn Central New Jersey track charts available to petitioners and now filed with STB. Although SLH claims petitioners' focus on the track charts is wrong, that is what USRA indicated it relied upon, and USRA suggests that SLH's focus on the val maps is what is in error.

3. SLH p. 3. SLH claims Jersey City ignored the 1942 and 1954 Record of Transportation Lines at Pet. Op. Appendices X and XI. We obviously did not ignore them; we presented them. They show that the Harsimus Branch here was historically a regulated branch, not a mere spur. Neither SLH nor Conrail contests that fact. The 1945 and 1954 Records do not contradict the subsequent track charts from 1965 to 1980. The track charts were obviously prepared later and for a different purpose. When one combines the old Records with the track charts, one sees that this was historically a line of railroad and that USRA designated it to be conveyed as a line of railroad. From that it inexorably flows that Conrail's act of unilateral reclassification was illegal.

4. SLH pp. 3-4. Citing Rebuttal Appendix D, SLH claims that Jersey City ignored an old val map/engineering report prepared by the Pennsylvania Railroad. Once again, USRA placed its reliance for purposes of its designations on line code track charts prepared by the Penn Central, not on old val

maps/engineering reports. See Final System Plan p. 241. Nothing in Rebuttal, Appendix D, is to the contrary. That Appendix indicates that our team researched the National Archives and found no evidence that USRA relied on the old val maps, including the one referenced by SLH, for purposes of the designation of line code 1420 to Conrail as a line of railroad. This hardly helps SLH.

5. SLH p. 4. SLH claims that Jersey City is making a "preposterous" argument because petitioners did not present the relevant Penn Central track chart. This contention was available to SLH at the time it filed its original Reply, but in any event is now itself "preposterous" because the Penn Central track chart has been presented to the Board without objection.

6. SLH pp. 4-5. SLH claims that the parcels it purchased are not within MP 1.0 to MP 7.0 as designated to Conrail at p. 272 of the Final System Plan, but are instead between MP 0.18 and MP 0.88. This claim, which Conrail also now parrots in its May 30 Reply, in a word is "baloney." MP 0.28 to MP 0.88 under the track charts would be somewhere under the Hudson River. The parcels SLH purchased are west of former Henderson Street (Luis Munoz Marin Blvd.). This street is approximately MP 1.3 on all the relevant track charts. Waldo is at MP 2.54. All the SLH parcels therefore are between approximately MP 1.3 and MP 2.54. SLH relies on extrapolations of mile post numbers to old val

maps, but those val maps were not those relied upon by USRA.¹⁰ Also, so far as we can tell from the National Archives, the UNJRR never used mileposts on its original val maps for the Harsimus Branch in the first place. The only reliable railroad milepost designations for the Harsimus at the time of the formation of Conrail were the line code track chart designations which USRA said it was using. Final System Plan 241. SLH remains engaged in rampant bootstrapping. It uses val maps that are not relevant to claim that USRA did not designate to Conrail what the track charts and Final System Plan clearly indicate USRA designated to Conrail. If SLH were correct, then the Fairfax Leary deed is wrong and the bankrupt railroad estates have been wrongfully cheated.

7. SLH pp. 5-7. SLH professes groggy confusion about the Harsimus Cove Yard, and claims not to understand our position. SLH even rhetorically asks how City believes the yard was conveyed to Conrail. The City does not just believe but knows how the "yard" was conveyed to Conrail: first, some of the yard was not conveyed at all. This is stated at page 262 of the Final System Plan. The portion of yard that was conveyed to

¹⁰ As we said at Pet. Op. p. 20, "as USRA points out in its FSP at p. 241, valuation maps generally reflect historical designations which were made when the lines were built. Through the years, portions of lines have been relocated, and mileposts on some lines have been renumbered. Milepost designations contained in the track charts do not always correlate with the valuation maps....

That is one of the reasons that the valuation maps generally do not take precedence over the track charts.

Conrail was conveyed pursuant to Final System Plan p. 272 and the deed discussed and contained in Appendices XV and XVI to Petitioners' Op. Statement.

SLH seems to think that once the term "yard" is involved, everything associated with it inevitably becomes "excepted track," by which we believe SLH means "not requiring an ICC/STB abandonment authorization." Conrail in its May 30 filing at p. 3 makes the opposite argument, claiming that if it has to abandon some of the yard, it must seek to abandon any portion thereof. As we explained in our Opening Statement, none of this is true. Not surprisingly, even Conrail's owners (at least CSX) and certainly STB precedent agrees with us. CSX Transportation -- Abandonment Exemption -- in Midland County, MI, AB 55 (sub-no. 573X), served August 25, 1999, involved an abandonment of 1.85 miles of line, running through a yard and terminating at the end of the yard, a situation essentially identical to that posed here. CSX obtained an abandonment authorization so it could reclassify the entire property as yard track. CSX did not attempt the reclassification of the entire property without prior STB approval because the yard included a through track (the end point of the yard) that was part of a "line of railroad." Moreover, CSX was not seeking authority to abandon a portion of the yard; it sought authority as to the through line in the yard so it could reclassify the entire yard as unregulated. The same situation applies here. The Harsimus Branch originally was the end of a line of freight railroad

carrying traffic all the way from the Midwest. Although the end of the line ran through a yard, the line did not terminate before the yard but at the very edge of the Hudson. (That in fact is the point of Rebuttal Appendix D's discussion of "First Main Track" which SLH tries to misconstrue elsewhere in its May 23 Reply.) Conrail in the circumstances obviously should have followed the same procedure its parent CSX employs where it wishes to convert the entirety of a yard in which a through track is located or in which a through track ends into "unregulated" property. We pointed the CSX Transportation case out in our Opening Statement at p. 36 n. 24, but SLH and Conrail ignored it, probably because it disposes of the confusions and alarms they seek to create as a kind of octopus ink to hide the illegal unilateral reclassification of the property at issue in this case.

SLH claims at pp. 6-7, citing Rebuttal p. 31 and p. 40, that our position is "internally contradictory" in that we say most of the land on the waterfront did not require prior abandonment authorization, but that the property at issue in this proceeding does. There is no internal contradiction. The situation is like that in CSX Transportation, supra. SLH charges us with ignoring cases, but SLH ignored this case completely, and the CSX decision is on point.

8. SLH p. 7 (last paragraph). What SLH seems unable to understand is that regulated rail carriers cannot unilaterally abandon a line of railroad. The Harsimus Branch all the way to

the Hudson was conveyed as a line of railroad. Even if there were spurs and sidings coming off the Branch after MP 1.3, the through line in the Branch was a "line of railroad," and it clearly encompassed MP 1.3 to MP 2.54. See CSX Transportation, supra, and discussion in Op. Statement at pp. 35-36 & n. 24.

9. SLH p. 7 n.3. This SLH footnote is confusing. SLH seems to say that the Fairfax Leary deed did not rely on the val map that SLH relies upon for milepost numbers. That is certainly true, but it means that SLH is relying on the wrong map, not that petitioners are. If SLH instead means that the Fairfax Leary deed does not contain the parcels comprising the Embankment which Conrail purported to deed to SLH, then that is belied by a title report and the legal opinion of a New Jersey-licensed attorney (Pet Op. Appendices XV and XVI). It is also belied by the maps associated with the deed which clearly show that the Embankment properties are part of the conveyance. As to the quoted statement on p. 3 of our Rebuttal, we are correct; if there are "false" (SLH's charge) statements, they are by SLH. If SLH has any point in this footnote, it is like the thirteenth chime of a clock, calling not only itself but also everything that SLH says into question.

10. SLH p. 8. SLH does not dispute the heavy use of the Harsimus Branch (more than 3000 cars/year) through 1984. However, SLH assumes that the Harsimus Branch was not designated to Conrail as a line of railroad but instead is all "excepted

track." Based on that erroneous assumption,¹¹ it now claims that use of the "excepted" track as a line of railroad does not convert it into regulated status. We summarized our legal position to the contrary in our Rebuttal at pp. 4-5.

SLH's argument at p. 8 is inconsistent with SLH's prior arguments. As we also noted in our Op. Statement at p. 28, Conrail and SLH in their original replies¹² to our Petition for a Declaratory Order in this proceeding argued that Conrail's "new use" dictated the nature of the line (at that time, Conrail and SLH were in ignorance that Conrail had used the line so heavily). Since SLH (and Conrail) originally claimed Conrail's use dictated the regulatory status, it is clearly inconsistent for SLH now to claim that Conrail's use is not relevant. SLH cites three cases for the proposition that a "new" railroad's otherwise regulated use of a line does not trigger regulation of an abandoned line. The three cases are all modified certificate cases.¹³ In each, railroads apply to STB for a modified

¹¹ The entire Harsimus (except the portions of the yard from MP 1.3 to MP 1.0 that were excepted out per Final System Plan p. 241 and the Leary deed) was designated to Conrail as a line of railroad. The line as a line was never unregulated.

¹² Conrail at 2; SLH at 4, both replies filed circa February 1, 2006.

¹³ Modified certificates are only available for lines authorized for abandonment or already abandoned but owned by a government. Under the modified certificate program, an operator obtains a modified certificate to operate the line, becoming a common carrier but only up to limits specified in its contract with the owner and as provided in the modified certificate. The government owner does not become subject itself to common carrier obligations. The whole reason for the program is to encourage preservation of otherwise to-be-abandoned lines by

certificate to operate on rail property which was not included in the Final System Plan for Conrail, and thus "was authorized to be abandoned without further regulatory approval." East Penn Railway -- Modified Rail Certificate, F.D. 34618, served Dec. 21, 2004. The modified certificate process is used to avoid complete re-regulation. If an "operator" began operation on an abandoned line without a modified certificate, both it and the owner of the property (even if a local government) would be subject to full common carrier obligations. See Simmons v. ICC, 697 F.2d 326, 331 (D.C. Cir. 1982) (first full paragraph summarizes ICC position). Seen in this light, the three cases cited by SLH prove petitioners' point and refute the position for which SLH cites them. Although we did not refer to them by name, we certainly state our legal position in our Op. Statement, and again in the Rebuttal at 4-5. All the case law, as we pointed out in our Opening Statement, indicates that a railroad line may not be abandoned absent a prior action by ICC, STB or a bankruptcy court. Conversely, if the property does become abandoned, or had previously gotten into "unregulated" status, it becomes regulated again if it is used as a line of railroad, even by a local government. See Simmons v. ICC, supra. There is no power of unilateral declaration of regulated or unregulated status by a rail carrier over a line subject to this Board's authority, and SLH has never cited a case to the contrary. Counsel for SLH feels that our dismissal

minimizing regulation that would otherwise apply.

of his three cases was "flippant" (his word). We simply felt the three cases were so clearly off-point as not to require further discussion.